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No. 76-420

In the Supreme Court of the United States

OCTOBER TERM, 1976

RALPH RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his prosecution and conviction were barred by due process principles in light of allegedly excessive governmental involvement in the crime, and that the district court erred both in limiting his cross-examination of a government witness to the scope of the direct examination and in denying his mid-trial request for a continuance to depose a potential witness.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of having knowingly transferred forty-four counterfeit $100,000 Treasury notes with the intent that they be passed as genuine, in violation of 18 U.S.C. 473. He was sentenced to ten years' imprisonment. The court of appeals affirmed in an opinion on which we rely (Pet. App.).

On October 15, 1974, petitioner told an undercover Secret Service agent that he had access to a limitless supply of counterfeit $100,000 Treasury notes that he would sell to the agent for five to ten percent of their face value (Tr. 11-13). Following a series of negotiations with petitioner during the next month, the undercover agent agreed to purchase a quantity of the counterfeit notes and, on November 25, 1974, petitioner delivered forty-four of the counterfeits to a second undercover agent in Boston, Massachusetts (Tr. 46-55, 159-162).

Petitioner testified at trial, admitting that he had negotiated the sale of the counterfeit securities to the undercover agent and that he had in fact delivered them. He claimed, however, that John Ellsworth had introduced him to the undercover agent, had provided him with the securities, and was a government informant. Petitioner further claimed that during the negotiations he was simply following Ellsworth's instructions in a plan conceived by Ellsworth somehow to defraud the agent by selling him genuine Treasury notes (stolen for the purpose from Ellsworth's mother, and intended to be returned following their use by the agent as collateral for a bank loan) while pretending that they were counterfeit. Thus, petitioner testified, he believed the notes were genuine, not counterfeit, and had not the requisite intent to commit the crime of knowingly transferring counterfeit (Tr. 212-231). The jury disbelieved and convicted.

1. Petitioner contends that Ellsworth supplied the counterfeit currency and that therefore the government was

involved in the crime to a degree not allowed by principles of due process.[1] This claim is foreclosed by *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976, in which this Court ruled that due process is not denied when a government agent supplies a defendant with contraband the sale of which to another government agent forms the basis for the indictment.[2] Although the several opinions in *Hampton* leave open the possibility that governmental participation in the events leading to a prosecution might in some case appear so outrageous as to preclude prosecution, this case—which (assuming the accuracy of petitioner's testimony regarding the source of the counterfeit) is indeed very much like *Hampton* itself—does not approach such a situation.

2. The trial court did not err in restricting petitioner's cross-examination of a government undercover agent concerning Ellsworth's role in the transaction. As the court below correctly ruled (Pet. App. 18, n. 3): "[T]he subject

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[1]While petitioner's uncorroborated testimony that Ellsworth provided the counterfeit securities was not directly contradicted by other evidence at trial, the jury need not have credited petitioner's extraordinary tale. *Masciale* v. *United States*, 356 U.S. 386. Indeed, in finding petitioner guilty the jury necessarily rejected his testimony that because of his ongoing business relationship with Ellsworth he was unaware of the counterfeit nature of the securities. Moreover, the government made an offer of proof indicating that Ellsworth was in fact not the supplier and that the actual supplier had been arrested and indicted (Tr. 100, 104-105).

[2]Petitioner attempts to distinguish *Hampton* on the ground that the informant in that case testified and contradicted the defendant's claim that the informant had supplied the contraband (Pet. 7). That fact, however, was irrelevant to the decision, which concerned the refusal of the trial court to instruct the jury that governmental supply of contraband, if proved, amounts to entrapment as a matter of law.

was not part of the government's case and was outside the scope of proper cross-examination. F. R. Evid., Rule 611(b). Indeed, during the bench conference defense counsel admitted that the attempt was 'premature' [Tr. 94]." See *United States* v. *Ramirez*, 533 F. 2d 138 (C.A. 5); *United States* v. *Simpkins*, 505 F. 2d 562 (C.A. 4), certiorari denied, 420 U.S. 946; *United States* v. *Hykel*, 463 F. 2d 1192, 1194 (C.A. 3).

3. Nor did the district court err in refusing to grant petitioner's mid-trial request for a continuance so that he could obtain a deposition from Ellsworth.

At the end of the first day of the two-day trial, the defense stated that Ellsworth must be an informant (a statement the government did not contradict) and requested his production. It was subsequently ascertained that Ellsworth had suffered a slipped disc and was under doctor's orders not to travel (Tr. 268). Petitioner then requested a continuance. In denying the request the district court acted well within the discretion committed to the trial court in such matters. *Ungar* v. *Sarafite*, 376 U.S. 575, 588-591. As the court of appeals observed (Pet. App. 18-20), if (as petitioner alleged) Ellsworth had indeed participated in the transaction and told petitioner that the Treasury notes were genuine, not counterfeit, then petitioner would have known eight or nine months prior to trial that Ellsworth's testimony would be crucial to his defense. The court of appeals correctly ruled (*ibid.*) that petitioner had made no serious effort to obtain Ellsworth as a witness prior to trial and that his mid-trial motion for a continuance had therefore been properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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